79-1529

SUPREME COURT, U.S.
FILED
MAR 31 1980

IN THE

Supreme Court of the United States

October Term, 1980

No.

HENRY AMEN,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MICHAEL S. WASHOR
A Member of the Bar of the United States Supreme Court
299 Broadway
New York, N.Y. 10007
Tel. (212) 732-2077

WASHOR & WASHOR, ESQS.
Attorneys for Petitioner

DICK BAILEY PRINTERS, 290 RICHMOND AVENUE, S.I., N.Y. 10302
TELEPHONE: (212) 447-5358

TABLE OF CONTENTS

	Page
Petition for Writ	1
Opinion Below	1
Jurisdiction	2
Questions Involved	2
Rules of the Supreme Court	2
Statement of the Case	3
Reasons for Granting the Writ	8
Conclusion	13

APPENDIX

Appendix A—Statutes: 26 U.S.C. Sections 7201, 7203, 7207	1a
Appendix B—Written Opinion of United States Court of Appeals for the Second Circuit	3a

CITATIONS

Clay v. State, 52 Tex. Cr. R. 555	12
Holland v. U.S., 348 U.S. 121	12
Sansone v. U.S., 380 U.S. 343	8

Spies v. U.S., 317 U.S. 492..... 12

State v. Savre, 129 Iowa 122..... 12

U.S. v. Bishop, 412 U.S. 346..... 12

U.S. v. Comer, 421 F.2d 1149..... 9

U.S. v. Murdock, 290 U.S. 389..... 12

U.S. ex rel O'Connor v. State of New Jersey, 405 F.2d 632..... 12

U.S. v. Whitaker, 447 F.2d 314..... 9

Yeager v. O'Connor, 395 U.S. 923..... 12

IN THE SUPREME COURT OF THE UNITED STATES

HENRY AMEN,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

Petitioner, HENRY AMEN, respectfully requests that a Writ of Certiorari issue to review the judgment and order of the United States Court of Appeals for the Second Circuit, entered on or about March 10th, 1980, affirming a judgment of the District Court for the Eastern District of New York entered on or about September 14th, 1979, convicting petitioner after a jury trial of the crimes of under-reporting taxable income for the years 1972 and 1973, in violation of Title 26, U.S.C. §7201.

As a consequence of these convictions, the petitioner's sentence was suspended; he was placed on probation for one year on each of the two counts, to run concurrently, and received a $5,000.00 fine on each of the two counts.

OPINION BELOW

The United States court of Appeals for the Second Circuit affirmed the judgment of conviction with written opinion. (See Appendix "B" for the written opinion)

JURISDICTION

The Order of the United States Court of Appeals for the Second Circuit, was rendered on March 10th, 1980.

The jurisdiction of this Court is invoked, made and conferred under 28 U.S.C. 1254(1) and under Rule 19(1) of the Rules of the Supreme Court.

QUESTIONS INVOLVED

1. Was the petitioner's Constitutional rights violated when the leser-included offense instruction was denied by the Trial Court after petitioner's timely request?

2. Does the word "willfully" denote a lower degree of turpitude in 26 U.S.C. §§7203 and 7207, Tax Misdemeanor Statutes, than in 26 U.S.C. §7206(1), a Tax Felony Statute, making the misdemeanors lesser-included offenses of the felony, and subject to a requested lesser-included offense charge?

RULES OF THE SUPREME COURT

"Rule 19, Considerations Governing Review of Certiorari.

1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons which will be considered:

(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

STATEMENT OF THE CASE

The Government's case against the appellant for the years 1972 and 1973, rested substantially on the office records maintained by the tax payer. The Government asserted that the specific item method of proof was used. Testimony by the employees of appellant, receptionist-secretaries employed by the appellant during these two years, appeared to indicate that the patient cards were maintained for each patient reflecting treatment, fees charged, and payments as received under column credits and discounts (60-64, 117).[1] At the end of each day a tape was made of the receipts listing each payment (69, 120). This tape along with cash and checks, were delivered to the appellant at the end of the day. It is unknown if the patient cards were also returned to the appellant at that time for cross-reference (81). Deposits were made once a week by the employees (86, 102, 112, 121); Receipts from the weekend were given to the employees by the appellant on Monday for recordation on the patient cards. The only entries made on the patient cards by the appellant personally were related to dental treatment as well as the fees to be

1. Numberals in parenthesis refer to pagination of the trial transcript.

charged for services to be rendered. No cross-reference was made by the receptionist as to daily amounts received and weekly deposits made (116). All checks and all cash were deposited (124).

Appellant would enter the amounts received, ostensibly, utilizing summary daily records in a cash receipts book. This cash receipts book was used by appellant to determine his yearly income (108).

Appellant delegated all of the other administrative duties to the receptionists, i.e., accepting and making all telephone calls; arranging for appointments with patients; collecting all monies and fees from patients; maintaining all books and records (60); preparing and filing of all expenses and payment of all bills (71); keeping and maintaining all the files in the office (97); writing and preparing all checks for the business (71); mailing all bills and checks for expenses (83, 96); reconciling and balancing the business checking account (84, 97); making all bank deposits and maintaining all deposit slips (86, 102); preparation of 941s (101); and preparing a list of expenses for appellant at the end of each month (97, 126).

Inactive patient files were transferred to the basement of appellant's office by the employees (134). None of the appellant's receptionists had bookkeeping or accounting training.

The income tax returns of appellant were prepared by Mr. Arthur Spagna, a real estate attorney with no accounting-tax background (53-54). The returns were prepared just prior to April 15th (43), from figures and information obtained from slips of paper submitted to the attorney by the appellant (43). There were neither books nor records shown to Mr. Spagna (44). Attorney Spagna performed the filing of the tax forms and determination of the tax.

Government agents revealed that appellant fully cooperated during the course of the examination and investigation (151, 161, 224, 243). Appellant made all records, documents, journals, and books available (162, 163, 175). Every request and every demand by the I.R.S. was complied with.

At the time of the first examination by the Government, the entry on the patient cards that were in the current files originally totalled $25,209 for 1972 (172), and $58,510 for 1973 (174). The amount reported as gross income from the cash receipt books maintained by the appellant was arithmetically inaccurate (213).

After analyzing the patient cards available, reflecting payments, credits, etc., the total came to $68,374.35 for 1972, and $84,372.00 for 1973 (229). The cash receipts book maintained by appellant contained numerous mathematical errors (100 in Appellant's favor and 30 in favor of the Government in 1972; 7 mathematical addition errors in 1973) (232). Additionally, there were instances where a digit was dropped, i.e., $160.00 on the patient card with the recordation of $16.00 in the cash receipt book. (5 in 1972 and 100 instances in 1973). (232) The figure "5" was added to a number increasing the value, i.e. $20.00 reflected on the patient card and recorded as $520.00 in the cash receipt book.

Petitioner's gross receipts in each of the years 1972 and 1973, as reflected on his returns, totalled approximately $38,000.00 (22).

There were more than "800" instances where entries in the cash receipt books were not found to be on the patient cards. There were "400" entries showing payments reflected on the patient cards but not reflected in the cash receipt books (231).

Certain check payments were not claimed as deductions by petitioner; Government's exhibit 9A and 10A reflected notes found on envelopes containing cancelled checks in the sum of $6,700.00 which were not reported as dental laboratory expenses. Exhibit 9A reads:

"Done in order not to have a high gross in 1972."

and Exhibit 10A reads:

"Not reported for 1973." (246)

The written comments on the envelopes and the notes are unexplained.

The investigation revealed that there was no diversion of any money and all the income receipts were deposited in the bank accounts of appellant (293). There were no hidden assets.

Additional mathematical errors were found in daily totals, weekly totals, monthly totals, and yearly totals (304). A correct mathematical total of the cash receipt book reflects $56,217, still short of the total of the patient cards. The Government concedes that they do not know which of the figures, if any, are accurate; i.e. the patient cards, the cash receipts books, or the bank deposits. Nor could the Government establish what, if any, was the true amount paid from any of the petitioner's patients (309).

SPECIFIC FACTS DEMONSTRATING THE LEGAL PROPRIETY OF THE PETITIONER'S REQUEST TO CHARGE THE LESSER-INCLUDED OFFENSES, 26 U.S.C. §§7203 and 7207.

A) The specific request for the lesser-included offenses, 26 U.S.C. §§7203 and 7207, were made and denied (330).

B. All business records were prepared by the receptionist-secretaries, including but not limited to, telephone calls, appointment diaries, collection of monies and fees, all bookkeeping, receiving and paying and filing of bills and expenses, writing of all checks, the reconciliation of bank accounts, and making all bank deposits (60, 71, 83-84, 96-97, 115-117, 120-122, 124-127).

C) All income receipts were recorded by the receptionists-secretaries on the patient cards (4, 60, 64, 76, 119, 120). However, the receptionists-secretaries failed to make the accurate entires (89-92, 94-96, 140-143). The patient cards used by Appellant, were for recording the medical treatment rendered by the petitioner to each patient.

D) Daily totals of income receipts were given to the petitioner on a slip of paper (tape) prepared by the receptionists-secretaries (66, 69, 77, 120, 125).

E) Weekly or monthly totals of business expenses were given to the petitioner on a slip of paper (tape) prepared by the receptionists-secretaries (132-133).

F) There are over "800" instances found where entries of fees were made in a cash receipt book and not noted on the patient cards (23, 89-92, 94-96, 140-143, 249-250). The receptionist-secretaries failed to note money entries approximately "800" times.

G) The Government concededly reviewed only a portion of the patient cards; there were patient cards that did not reflect fee notations (155-156).

H) The Government admitted that there were "1500" discrepancies found in the petitioner's books and records (231).

I) The Government conceded that there were 130 instances where mathematical errors existed (231-232). There were more than 35 mathematical errors made in addition and subtraction on a daily, weekly, monthly, and yearly basis (239).

J) The total figures, accurately added, in the cash receipt books, would be substantially higher, reflecting a greater income (305), and greater negligence rather than specific criminal intent on the part of the petitioner.

K) There was no diversion of any income by the petitioner and all the income was deposited in a bank (292-294).

L) All Petitioner's income was deposited into his checking accounts (293 and 307).

M) The Government was provided with petitioner's bank accounts (243, 286), but never totalled the deposits; although the Government recognized that this was the only accurate record of petitioner's income (307, 309-310).

N) The Government conceded that they did not know which, if any, of the patient cards or cash receipt books were accurate (309).

O) The record is barren as to when, how, why and under what circumstances the petitioner segregated the "expense' checks in two envelolpes (Government's Exhibits 9A and 10A) (312).

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals for the Second Circuit is in conflict with this Court's decision in *Sansone vs. United States* (380 U.S. 343) and with the decisions of other Courts of Appeals. If left standing, the decision will adversely affect the administration of the criminal tax laws and may also enhance prosecutions of non-tax felonies involving wilfulness.

A defendant is entitled to a lesser-included offense instruction where some (but not all) of the elements of the offense charged themselves constitute a lesser offense. However, no such instruction is proper where the facts to be resolved by the jury are the same as to both the lesser and greater offenses. (*Sansone v. U.S., supra*).

Rule 31(c) of the Federal Rules of Criminal Procedure, incorporates the general rule that a defendant is entitled to have the jury instructed as to a lesser-included offense.

On lesser-included offense instructions, this Court last stated:

> "The basic principles controlling whether or not a lesser-included offense charge should be given in a particular case have been settled by this Court. Rule 31 (c) of the Federal Rules of Criminal Procedure provides in relevant part, that the 'defendant may be found guilty of an offense necessarily included in the offense charged'; thus, in a case where some of the elements of the crime charged themselves constitute a lesser crime, the defendant, if the evidence justifies it . . . is entitled to an instruction which would permit a finding of guilt of the lesser offense." (*Sansone vs. U.S., supra*).

In *U.S. v. Comer* (421 F. 2d 1149), the Court held that:

> "Thus, in an appropriate case, failure to grant an instruction on a lesser-included offense requested by the defense is reversible error."

In *U.S. v. Whitaker* (447 F. 2d 314), at page 321, the Court stated:

> "If the evidence is such that a jury can rationally—and is likely—to choose the lesser offense, then the interests of justice call for the defense to have the option of the lesser— included offense—whether the prosecution chose to put it in the indictment or has the right later to request it or not."

In the *Whitaker* case, the Court set forth five conditions which must be met to give a lesser-included offense. The conditions appear to be the most expanded test set forth by a Court thus far, and consonant with this Court's holding in *Sansone vs. U.S., supra.* The five conditions are:

1. "A proper request must be made,"
2. "The elements of the lesser offense must be identical to part of the elements of the greater offense,"
3. "There must be some evidence which would justify conviction of the lesser offense,"

4. "The proof on the elements or elements differentiating the two crimes must be sufficiently in dispute so that the jury may consistently find the defendant innocent of the greater and guilty of the lesser-included offense,"

5. "In general the chargeability of lesser-included offenses rests on a principal of mutuality, that if proper, a charge may be demanded by either the prosecution or defense." (*United States vs. Whitaker,* supra, at page 317).

Petitioner's situation fulfills the tests in *Sansone vs. U.S.*, and *U.S. vs. Whitaker, supra.*

A proper request was made for the charge of lesser-included offenses and was denied; therefore, the first part of the test is met.

The elements of 26 U.S.C. §7201 are (1) wilfullness, (2) a tax deficiency, and (3) an affirmative act constituting an evasion of a tax.

The elements of 26 U.S.C. §7203 are (1) wilfullness, and (2) failure to pay tax due.

The elements of 26 U.S.C. §7207 are (1) wilfullness, and (2) an affirmative act.

Both misdemeanor provision encompass two of the three elements required for violation of 26 U.S.C. §7201.

The elements of the misdemeanor offenses are identical to part of the elements of the felony offense, and therefore the second part of the test is met.

Assuming the jury concluded that the Government established wilfullness beyond a reasonable doubt, the jury could well have also concluded that the petitioner failed to pay a tax due without reaching the conclusion that there was a substantial tax deficiency. This would have permitted the jury to find the petitioner guilty of the lesser offense and not guilty of the felony charge. In the posture of all the errors, mistakes, and discrepancies, the jury could have rationally concluded that the petitioner did not

commit an affirmative act constituting a wilful evasion of a tax due.

Likewise, the jury could have rationally concluded that there was wilfullness and an affirmative act (the segregation of the expense checks—Government's Exhibits 9A and 10A) without having concluded that the Government established beyond a reasonable doubt the existence of a tax deficiency. The Government conceded at trial that they did not know which records, if any, were accurate (309).

Wilfullness, the existence of a tax deficiency, an affirmative act constituting an evasion of a tax, and a failure to pay a tax due were elements that were all in dispute. Therefore, the third and fourth part of the test is met.

The felony charged and the lesser-included offenses (misdemeanors) fall within the fifth part of the test on mutuality. The crimes are such that the greater fails if the lesser is not present. All elements of the greater crime are included in the lesser. The fact that the Government in the case at bar chose not to acquiesce to a lesser included offense charge is of no legal consequence. The Government's position was based upon the Justice Department internal policies and not premised on the lack of mutuality. The colloquy between the Court, defense attorney and prosecution is self-exacting:

"Mr. Washor: My only other concern is the ruling on the lesser two included offenses.

The Court: He wants a lesser-included charge in the felony down to the misdemeanor.

Mr. Sayah: I cannot do that. I am bound by the Justice Department rules. That is the problem with the case.

Mr. Washor: My point is that I am requesting it. If the Court is going to deny it I have no choice but to except to it and that is it."

The factual dispute as to all elements of the felony and requested misdemeanors was severe. In *U.S. ex rel O'Connor vs. State of New Jersey* (405 F. 2d 632), citing *Yeager vs. O'Connor* (395 U.S. 923), the Court stated at page 638:

> "A defendant in a criminal case is as entitled to a proper determination of the degree of guilt as he is to a determination of the question of guilt itself."

The term "wilfully" cannot have the same meaning under §§7201 and 7203 and 7207 in the presence of the disputed factual premises in the case at bar. While this Court observed in *U.S. vs. Bishop* (412 U.S. 346), that the word "wilfully" has the same meaning in §7207 that it has in §7206, it was based upon the premise that the only issue in dispute, in *Bishop, supra,* was wilfullness. Under those circumstances, a lesser-included offense instruction was not required. In the case at bar, all other elements were also in dispute.

Prior to *Bishop, supra,* this Court has held that the requirement of wilfullness in a tax felony prosecution is different from and greater than the same requirement in a tax misdemeanor prosecution. (*U.S. vs. Murdock,* 290 U.S. 389; *Spies vs. U.S.,* 317 U.S. 492). In *Murdock, supra,* the Court cited cases in support of its position which applied the lower standard of wilfullness to offenses involving turpitude. (Eg. *Clay vs. State,* 52 Tex. Cr. R. 555; *State vs. Savre,* 129 Iowa 122).

This court also indicated in *Spies vs. U.S., supra,* that such lower standard applied to tax misdemeanors.

Fraud cannot be inferred from the mere understatement of income (*Holland vs. U.S.,* 348 U.S. 121). This court has recognized that negligence, whether slight or great, is not equivalent to fraud with intent to evade taxes. In *Holland vs. U.S., supra,* this court stated at page 396:

> "Congress did not intend that a person, by reason of a bonafide misunderstanding as to his liability or tax . . . or as to the adequacy of the records he maintained, should become a criminal by his mere failure to measure up to the prescribed standard of conduct."

The term "wilfullness" that is used for §7201 and §§7203 and 7207 cannot have the same meaning lest all sections would be identical as applied to income tax prosecutions. This court, in *Sansone, supra,* at page 348, has stated that it is:

> "Unwilling to presume that Congress intended to enact both felony and misdemeanor provisions which completely overlap in this important area."

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
March 26th, 1980

Respectfully submitted,

WASHOR & WASHOR, ESQS.
MICHAEL S. WASHOR, ESQ.
Attorneys for Petitioner
299 Broadway
New York, N.Y. 10007
(212) 732-2077

APPENDIX A
STATUTES: 26 U.S.C. SECTIONS 7201, 7203, 7207

TITLE 26 U.S.C. §7201

"Attempt to Evade or Defeat Tax.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution. (Aug. 16, 1954, c. 736, 68A Stat. 851)."

TITLE 26 U.S.C. §7203

"Willful Failure to File Return, Supply Information, or Pay Tax.

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution. (Aug. 16, 1954, c. 736, 68A Stat. 851)."

TITLE 26 U.S.C. §7207

"Fraudulent Returns, Statements, or Other Documents.

Any person who willfully delivers or discloses to the Secretary or his delegate any list, return, account, statement, or other document, known by him to be fraudulent or to be false as to any material matter, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both. (aug. 16, 1954, c. 736, 68A Stat. 853).

Prior Law.—Internal Revenue Code of 1939, §§894(b)(2), 3616(a), 3672, 3793(b)."

APPENDIX B—WRITTEN OPINION OF UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

"UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the tenth day of March, one thousand nine hundred and eighty.

Present:
Hon. James L. Oakes,
Hon. Ellsworth A. Van Graafeiland,
Circuit Judges.
Hon. Charles H. Tenney,
District Judge.

United States of America,
Appellee,

v.

79-1347

Henry Amen,
Appellant.

ORDER

This appeal is from convictions after a jury trial in the United States District Court for the Eastern District of New York, Mark A. Constantino, *Judge,* for two counts of tax evasion in violation of I.R.C. §7201, for the years 1972 and 1973. We affirm.

The Government's case was built on both circumstantial and direct evidence. Appellant Dr. Henry Amen's

receptionist-secretary recorded patient charges and paid receipt amounts on "patient cards". At the end of each day, all cash and check payments were tallied on an adding machine, and the totals slip, money, and a list of paying patients' names were then given to appellant. Appellant would make entries in his "cash receipts books," never seen by others, and would give his secretary money to be deposited in the bank, usually once or twice a week.

A comparison between the gross receipts reflected in the "patient cards" and the gross business income Amen reported revealed that, for 1972, the cards totalled $68,000 while appellant reported $38,282, and for 1973, the cards totalled $84,000 while he reported $39,188.

In the cash receipts books over which Amen had exclusive control and upon which his tax returns were based, there were roughly 1,500 discrepancies, including a consistent patttern of substantial addition errors almost entirely in Amen's favor and 100 instances where digits were dropped from amounts listed on the patient cards to amounts listed in his books, *e.g.* $1,200 on card, $12 in book. There was apparently one instance where digits were added to the amount in Amen's books. In addition, 800 entries not reflected on patient cards nevertheless appeared on Amen's books, while 400 entries on the cards did not appear in the books. As to the 800, appellant argues that this demonstrates that his employees made 800 errors by not entering actual receipts from patients on the cards. But since most of the cards were in perfect debit-credit balance, Amen's argument suggests either that many patients overpaid their bills, while his secretaries only recorded the receipt of assessed charges, or that the cards were entirely unreliable. The Government posits that Amen made 800 fictitious entries in his books.

There were also two notes handwritten by appellant, attached to two envelopes containing cancelled checks for 1972 and 1973 dental lab expenses, stating "done in order

not to have high gross," and "not reported for 1973." These expenses were never taken as tax deductions for the relevant tax years.

Appellant makes two principal claims on appeal. He first argues that the jury's verdict was based on mere speculation and guesswork and that a directed verdict should have been granted. To prove tax evasion, the Government must prove beyond a reasonable doubt (1) willfulness, (2) the existence of a tax deficiency, and (3) an affirmative act constituting evasion or attempted evasion of the tax. *Sansone v. United States,* 380 U.S. 343, 351 (1965). The latter two elements were clearly established here, since the filing of the false return itself represented the affirmative act, *id.* at 351-52, and the underreporting of income recorded on the patient cards indicated the existence of a tax deficiency. Amen's own bank deposits were also in excess of the amounts shown on the cards, further supporting the finding of a tax deficiency.[1]

The only element truly contested by appellant is proof of willfulness. Amen claims that the Government failed to prove anything beyond negligence on his part and his mistaken reliance on negligent employees who were themselves largely responsible for the errors. But when the evidence in total is taken in the light most favorable to the Government, *Glasser v. United States,* 315 U.S. 60, 80 (1942), we think a reasonable jury could find that Amen willfully evaded taxes beyond a reasonable doubt, given the frequency of his errors and their overall consistency in benefitting the taxpayer. As the Court stated in *Holland v. United States,* 348 U.S. 121 (1954):

> Here, however, there was evidence of a consistent pattern of underreporting large amounts of income, and of the failure on petitioners' part to include all of their income in their books and records. Since, on proper submission, the jury could have found that these acts supported an inference of willfulness, their verdict must stand.

Id. at 139 (citation omitted). In addition, the notes attached to the envelopes certainly indicated some knowledge of the tax laws and an intent not to take deductions fully entitled to appellant. A jury could conclude, as the Government suggests, that Amen did not claim these expenses because he did not want his reported gross income to appear too low in comparison with his actual expenses.

Appellant's other principal argument is that the district court erred when it failed to charge the jury on two lesser-included misdemeanor offenses, I.R.C. §§7203 and 7207.[2] *Sansone v. United States, supra,* sets forth the appropriate test:

> "[i]n a case where some of the elements of the crime charged themselves constitute a lesser crime, the defendant, if the evidence justifie[s] it . . . [is] entitled to an instruction which would permit a finding of guilt of the lesser offense." *Berra v. United States, supra,* at 134. See *Stevenson v. United States,* 162 U.S. 313. But a lesser-offense charge is not proper where, on the evidence presented, the factual issues to be resolved by the jury are the same as to both the lesser and greater offenses. . . . A lesser-included offense instruction is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense.

380 U.S. at 349-50 (citations omitted). *See also United States v. Tsanas,* 572 F. 2d 340 (2d Cir.), *cert. denied,* 435 U.S. 995 (1978).

Thus, in applying the *Sansone* rule, there must be a disputed issue of fact concerning the existence of an element required for conviction under §7201 but not required under §§7203 or 7207. As to the first element of §7201, a finding of willfulness is a required element for all three violations, so appellant would be entitled to a lesser-

included offense charge only if one or both of the remaining factors of §7201 were not required for conviction under §§7203 or 7207 and were in dispute.

The "affirmative act" element of §7201, established here by the filing of the false return, is not in dispute and therefore makes irrelevant inquiry as to whether such an element is required for conviction under §§7203 or 7307.[3]

As to the "existence of a tax deficiency" element in §7201, §7203 itself also involves failure to pay a tax due, thereby requiring a jury to consider the same factual issues for the greater and lesser charges and precluding a lesser-included offense charge, since on the facts of this case, §7201 and §7203 "cover [ ] precisely the same ground." *Berra v. United States,* 351 U.S. 131, 134 (1956). Although §7207 does not require the existence of a tax deficiency, appellant has not contested the fact of underreporting, nor has he suggested that other deductions he would lawfully be entitled to take would sufficiently offset the underreported amounts.[4] In short, this issue is not in dispute, and §§7201 and 7207 "cover[ ] precisely the same ground." *Id.*

Appellant's remaining contentions are without merit and require no comment.

JAMES L. OAKES U.S.C.J.

ELLSWORTH A. Van GRAAFEILAND
U.S.C.J.

CHARLES H. TENNEY
U.S.D.J."

" 1. The fact that deposits exceeded reported income is clearly not in itself dispositive proof of a tax deficiency, since deposits may have been generated from other non-taxable sources such as loans. However, in this case, it may certainly constitute additional supporting evidence of the evasion.

2. Section 7201 states:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall . . . guilty of a felony. . . .

Section 7203 states:

> Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall . . . guilty of a misdemeanor. . . .

Section 7207 states:

> Any person who willfully delivers or discloses to the Secretary or his delegate any list, return, account, statement, or other document, known by him to be fraudulent or to be false as to any material matter, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both. . . .

3. Appellant concedes that the amounts reported as gross income on his returns were inaccurate. Brief of Appellant at 4, 10.

4. Appellant states that the Government's evidence was "possibly sufficient to establish income tax deficiencies in these particular returns." Brief of Appellant at 12."